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In The

Supreme Court of the United States

October Term, 1996

CITY OF BOERNE, TEXAS,

Petitioner,

v.

P.F. FLORES, ARCHBISHOP OF SAN ANTONIO

and

UNITED STATES OF AMERICA,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF OF PETITIONER

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STATEMENT OF LATE AUTHORITY

On January 27, 1997, the United States Court of Appeals for the Ninth Circuit ruled that the Religious Freedom Restoration Act (RFRA) is a valid exercise of congressional authority under Section Five of the Fourteenth Amendment and that it does not violate the Establishment Clause. *Mockaitis v. Harcleroad*, No. 96-35901, 1997 U.S. App. LEXIS 1274; 1997 WL 27111 (9th Cir. Jan. 27, 1997). In one paragraph, the court of appeals rejected the State's Section Five argument, relying exclusively on the expansive reading of Section Five in *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966). *Mockaitis*, 1997 U.S. App. LEXIS, at *20-21; 1997 WL 27111, at *8. The court then rejected the State's argument that RFRA violates the Establishment Clause because exemptions advance religion and because RFRA forces courts to define "religion." *Id.* The court of appeals did not address the separation of powers violation posed by RFRA or the Section Five and Establishment Clause arguments raised by Petitioner in this case.

ARGUMENT

I. RFRA IS A STATUTE THAT REDEFINES THE MEANING OF THE FREE EXERCISE CLAUSE AND THEREFORE VIOLATES THE SEPARATION OF POWERS

Neither Respondents nor any *amici* supporting Respondents come to terms with the City's separation of powers argument. Respondents' interpretation of the separation of powers is more accurately labeled a theory of the "duplication of powers." It fails to reflect the Framers' fundamental insight that the *core functions* of each branch must be kept distinct – a separation of federal powers that protects not only individual liberty, but also the powers reserved to the States. *The Federalist* No. 47, at 302-03 (James Madison) (Clinton Rossiter ed., 1961); *see Loving v. United States*, 116 S. Ct. 1737, 1743 (1996); *Plaut v. Spendthrift Farm, Inc.*, 115 S. Ct. 1447, 1453-56 (1995). For the Framers, the legislative branch was the least trustworthy:

> [The legislative department's] constitutional powers being at once more extensive, and less susceptible of precise limits, it can, with the greater facility, mask,

> under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments.
>
> . . . .
>
> . . . [Legislatures] have accordingly, *in many* instances, *decided rights* which should have been left to *judiciary controversy* . . . .

The Federalist No. 48, at 310-11 (James Madison).

That RFRA invades the Court's core function and thus oversteps the line of separation between the legislative and judicial branches is evident from the following brief, straightforward principles, which Respondents do not contravene:

(1) In *Employment Division, Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), this Court engaged in the distinctive judicial function of resolving an Article III case or controversy by reading and interpreting the relevant constitutional text.

(2) The *Smith* majority performed a "permissible reading of the text" of the Free Exercise Clause so as to limit its scope to laws that are "specifically directed at . . . religious practice." *Id.* at 878. The Court thereby rejected a reading that would also apply the Clause to general and otherwise valid neutral laws that incidentally burden religious exercise. *Id.* at 885; *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-32 (1993) (affirming *Smith* approach to free exercise challenges).

(3) Under this Court's reading of the Clause, which categorically excludes neutral and generally applicable laws, such laws need not be justified by a compelling governmental interest even though religious practices are incidentally burdened. On the other hand, a law targeted at religious exercises could be valid, under the Court's reading of the Free Exercise Clause, only if justified by a compelling governmental interest. *See Lukumi*, 508 U.S. at 531-33; *Smith*, 494 U.S. at 878. All of which demonstrates that the decision whether to employ the compelling governmental interest doctrine is an integral part and a necessary consequence of the judicial function of interpreting the text of the Free Exercise Clause in the context of Article III cases and controversies.

(4) RFRA is solely a directive to the federal and state judiciary to expand the reading of the Free Exercise Clause to

cover those laws that are neutral and generally applicable. *See* 42 U.S.C. §§ 2000bb(a)(1)-(2), (b)(1), 2000bb-1(a)-(b) (1994). The *Smith* textual reading plainly excluded such laws from free exercise inquiry. *Smith*, 494 U.S. at 885-90. Under the guise of creating a "statutory" cause of action to support a legislatively-preferred reading of the Free Exercise Clause, Congress has taken over the judicial function of interpreting the Constitution in the context of adjudicating cases. To quote the organization that "drafted, lobbied for, and ultimately secured the passage of" RFRA, "*Congress did say [with RFRA] that the Free Exercise Clause means something other than what this Court says it means.*" *See* Coalition for the Free Exercise of Religion Br. at 1, 27 (emphasis added) [hereinafter Coalition Br.].

"The enactment of RFRA can in no sense be said to involve the 'specially informed legislative competence' of Congress," *Keeler v. Mayor & City Counsel of Cumberland*, 928 F. Supp. 591, 603 (D. Md. 1996), but rather is an aggrandizement of Congress's power at the expense of this Court's core constitutional function. *Cf. Smith v. Fair Employment & Housing Commission*, 913 P.2d 909, 937 (Cal.) (Mosk, J., concurring), *petition for cert. filed*, 65 U.S.L.W. 3034 (U.S. July 8, 1996). *See generally* Eugene Gressman & Angela C. Carmella, *The RFRA Revision of the Free Exercise Clause*, 57 Ohio St. L.J. 65, 111 (1996).[1]

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[1] Even Congress's factfinding in RFRA is more akin to judicial activity than legislative. *See* Pet'r Br. at 12-26. Instead of conducting studies or asking various experts to analyze the state of religious liberty in the United States today, which one would have thought appropriate before passing a law that affects every law in the United States, Congress merely looked to post-*Smith* court decisions. S. Rep. No. 103-111, at 2-10 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1893-99; H.R. Rep. No. 103-88, at 2-9 (1993); *Religious Freedom Restoration Act of 1991: Hearings on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. 112, 157-58, 334-39, 361-71 (1992); *Religious Freedom Restoration Act: Hearing on S. 2969 Before the Senate Comm. On the Judiciary*, 102d Cong., 2d Sess. 10-12, 50-58, 71-76 (1992). The closest example of a study on religious liberty in the United States to be found in the RFRA legislative history or these proceedings is

Those *amici* who argue that RFRA need not be invalidated if this Court were to overturn *Smith*, *see infra* note 3, completely miss the separation of powers violation that occurred when Congress passed RFRA. *See* Catholic Conference Br. at 26-30; Commonwealth of Virginia Br. at 12-13; Rutherford Inst. Br. at 3-4. Even if this Court were to overturn *Smith* today, Congress overstepped its bounds when it enacted RFRA by imposing its interpretation of the Free Exercise Clause on the courts.

Overturning *Smith* is not the panacea that would salvage RFRA. As the City previously explained in detail, RFRA does not reflect the true state of this Court's free exercise doctrine before *Smith*. Pet'r Br. at 15-19. In order for this Court to make its free exercise doctrine match RFRA, it would have to institute an across-the-board compelling interest standard coupled to a least restrictive means test, which would apply in *every* situation – from government administration of services to prison oversight, unemployment compensation, drug laws, marriage laws, statutory rape laws, and child abuse laws. This Court has never treated *any* clause of the First Amendment to such an unforgiving standard, nor should it. *See, e.g., United States v. Eichman*, 496 U.S. 310, 318 (1990) (holding that where prohibition on speech is content-based it is "subjected to the most exacting scrutiny"); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 227-31 (1990) (holding that licensing schemes vesting unbridled discretion in the decision maker are subject to procedural safeguards); *Ward v. Rock Against Racism*,

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Respondent Flores' reference to two Gallup polls on public perception of certain religions. Resp't Flores Br. at 30.

In response to those claiming that Congress's fact finding for RFRA was adequate, *see* Resp't United States Br. at 26-27 n.25; Resp't Flores Br. at 29-36; ABA Br. at 7; American Jewish Congress Br. at 17; Hatch, *et al.* Br. at 28; Prison Fellowship Br. at 22-23; it must be emphasized that the handful of anecdotes that constitute the entirety of Congress's so-called factfinding in this instance must be measured against the *scope* of the statute. While anecdotes and case reports might be sufficient for a narrow statute impacting a narrow class, RFRA's application to every law enacted by every government, past or present, should demand significantly more factfinding. In fact, the statistical comparison of RFRA's factfinding to its scope would indicate that it approaches zero.

491 U.S. 781, 798-99 (1989) (holding that time, place, and manner restrictions on speech are subject to intermediate scrutiny); *Brandenburg v. Ohio*, 395 U.S. 444, 447-49 (1969) (holding that where a statute which forbids the use of violence fails to distinguish the "mere advocacy" of violence from the "incitement to imminent lawless action," such a statute violates the constitutional guarantees of free speech and freedom of the press); *United States v. O'Brien*, 391 U.S. 367, 377 (1968) (holding that non-content based speech is subject to intermediate scrutiny).

II. RFRA IS NOT A VALID EXERCISE OF CONGRESS'S AUTHORITY UNDER SECTION FIVE OF THE FOURTEENTH AMENDMENT

A. The Defense of RFRA as a Statute that Enforces the Equal Protection Clause Is a Pretext to Hide the Fact that the Purpose and Effect of RFRA Is to Amend the Meaning of the Free Exercise Clause and to Impose Congress's Interpretation on the States

Reading the Respondents' and their *amici*'s briefs is akin to Alice's experience when she gazed into the looking glass. "[T]hen smoke comes up in that room too – but that may be only pretence, just to make it look as if they had a fire." Lewis Carroll, *Through the Looking Glass, in Alice's Adventures in Wonderland and Through the Looking Glass* 193-94 (Puffin Books 1962) (1872). They repeatedly claim that RFRA is an equality statute intended to enforce the guarantees of the Equal Protection Clause. *See* Resp't United States Br. at 24-27, 30-32; Resp't Flores Br. at 36-37; ABA Br. at 12-15; Coalition Br. at 7; Hatch *et al.* Br. at 7, 16-19; NAACP Br. at 8-20; Prison Ministries Br. at 19-23. This is a last-ditch, *post hoc* effort by Respondents and their *amici* to preserve a statute that mocks constitutional limitations.

If RFRA is an equal protection statute, as the Respondents claim, it is curiously silent on this aspect. Unlike many statutes, RFRA has explicit "Findings" and "Purpose" sections, *see* 42 U.S.C. § 2000bb(a)-(b), neither of which support Respondents' equal protection characterization of the Act. The fact is that the words "discrimination" or "equality" do not appear in the Act, and the Act never refers to the Equal Protection Clause. Nor does

RFRA limit itself to minority religions. The legislative history's references to minority religions constitute an insignificant portion of the total.[2]

The truth is that RFRA was passed for the purpose of expanding the scope of the Free Exercise Clause of the First Amendment. *See* 42 U.S.C. § 2000bb(a)(1)-(4). RFRA explicitly refers to the First Amendment and outlaws burdens on religious conduct in every conceivable context. 42 U.S.C. §§ 2000bb(a)(1), 2000bb-2(4), 2000bb-3(a). Far from being a rule aimed at discrimination, the statute "guarantee[s the] application [of the compelling interest test and the least restrictive means test] *in all cases where free exercise of religion is substantially burdened.*" 42 U.S.C. § 2000bb(b)(1) (emphasis added). *See also* 42 U.S.C. § 2000bb(a)(2) ("[L]aws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise.").

Were Congress inclined to enact a rule against discrimination aimed at particular religions or religious practices, it would not look like RFRA. Rather, it would echo Title VII's religious anti-discrimination provisions, which provide:

> It shall be an unlawful employment practice for an employer [private or state] to fail or refuse to hire or to discharge any individual, or otherwise *to discriminate against* any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, *religion*, sex, or national origin. . . .

42 U.S.C. § 2000e-2(a)(1) (1994) (emphasis added).

Title VII's religious anti-discrimination provisions make clear that if Congress wanted to draft a statute outlawing discrimination on the basis of religion, it knows how to do so. Plainly, Title VII does not provide for the free exercise of religion in general. Rather, it protects only against discrimination on the basis of religion. *See Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 711-12 (1985)

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[2] With their equal protection defense of RFRA, Respondents are asking this Court to interpret RFRA solely on the basis of six percent of its legislative history, to ignore the remaining 94% of the legislative history, and, most importantly, to ignore the plain text of the Act.

(O'Connor, J., concurring) (characterizing Title VII's religious accommodation provisions as "anti-discrimination law" and "not the sort of accommodation statute specifically contemplated by the Free Exercise Clause"). The drafters of RFRA were fully aware of Title VII's religious anti-discrimination provisions, yet drafted a completely dissimilar law. *See* S. Rep. No. 103-111, at 13 (stating that "[n]othing in this act shall be construed as affecting religious accommodation under title VII of the Civil Rights Act of 1964").

Unlike the anti-discrimination inquiry copiously described and dissected by this Court in *Lukumi*, 508 U.S. at 532-35 (Kennedy, J.), *Id.* at 557-59 (Scalia, J., concurring), *Id.* at 560-64 (Souter, J., concurring), RFRA makes proof of discrimination, whether purposeful or in effect, inapposite to the inquiry.[3] Indeed, *the primary purpose of RFRA is to bring nondiscriminatory, or neutral, exercises of governmental authority into the strict scrutiny fold. See* 42 U.S.C. §§ 2000bb(a), (a)(2), (a)(4), 2000bb-1(a).

The equal protection justification for RFRA renders the Act overinclusive and underinclusive. If RFRA's purpose is to eliminate discriminatory actions taken against minority faiths, the Act is plainly overinclusive. By its terms, it covers every substantial burden on religion, not just those that are discriminatory in purpose or effect. *See 1992 Senate Hearing*, at 63 (statement of Douglas

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[3] The goal of the political powers that assembled to press RFRA upon Congress was starkly singular: overrule *Smith* and set in its place a rule against any substantial burdening of religious conduct. That goal remains apparent in the *amici* briefs filed in support of Respondents urging this Court to overturn *Smith*. *See* Commonwealth of Virginia Br. at 7-12; Minn. Family Council *et al.* Br. at 14-19; Nat'l Right to Work Legal Defense Found. Br. at 6-8; Rutherford Inst. Br. at 3-5. Apparently worried about RFRA's constitutional infirmities, Respondents' *amici* are now asking this Court, rather than Congress, to satisfy their demands to overturn the rule this Court announced in *Smith* and affirmed in *Lukumi*. *Smith*, 494 U.S. at 885-86; *Lukumi*, 508 U.S. at 531. The suggestion to reconsider *Smith* is not encompassed by the Questions Presented in this facial challenge to RFRA. Nor was the validity of *Smith* the basis of the decisions below. *See Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114, 1126 n.10 (1996); *Matsushita Electric Industrial Co., Ltd. v. Epstein*, 116 S.Ct. 873, 880 n.5 (1996).

Laycock) (stating that RFRA "would do much to correct the errors of *Smith*, and those errors affect not only minority or immigrant religions that are well outside the mainstream, but also mainstream faiths").

In a written submission to Congress, Douglas Laycock stated the following:

> [D]eliberate persecution is not the usual problem in this country. Churches and religious believers can lose the right to practice their faith for a whole range of reasons. . . . But *whether regulation results from hostility, or indifference, or ignorance, the consequence to believers is the same.*

1992 House Hearings at 334-35, 337 (emphasis added); *see also 1992 Senate Hearing* at 71-72. In sum, the purpose and effect of RFRA is to outlaw religious burdens *per se*, without regard to discrimination.

The Act's substantial overinclusiveness violates the Constitution's inherent principles of federalism and dual sovereignty by making "presumptively invalid," *Smith*, 494 U.S. at 888, thousands of local, state, and federal laws which do not discriminate.[4] Principles of federalism demand invalidation of RFRA's strict scrutiny

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[4] The Act's overinclusiveness could not be more apparent than it is in this case, which is not predicated on discrimination and which does not involve a "minority" religion, but rather a powerful, mainstream religion which is particularly powerful in South Texas, where the City of Boerne is located.

If Respondents' defense of RFRA as a measure to curb discrimination against minority faiths were correct, the Catholic Church would not be part of the class of intended beneficiaries of the Act. *See Piper v. Chris-Craft Industries*, 430 U.S. 1, 37 (1977) (citing *Cort v. Ash*, 422 U.S. 66, 78 (1975) (holding that a person invoking the statute must be "one of the class for whose *especial* benefit the statute was enacted")). The Church maintains that the membership of St. Peter Church is "2,170 and growing." Resp't Flores Br. at 1. Given that the estimated population of Boerne is 5,500, the Church's membership is approaching 40% of the population. In light of the Church of Jesus Christ of Latter Day Saints' definition of a minority religion as constituting less than 1.5% of the population, Latter-Day Saints Br. at A-2, Boerne's St. Peter Church is an extraordinarily powerful political force, not one of the politically disempowered minority

standard that overreaches into so many local and state laws, even if the Act could be applied constitutionally, per *Lukumi*, in the rare instances where there is anti-religious discrimination against a minority religion. *See New York v. United States*, 505 U.S. 144, 155-59 (1992) (discussing federalism structure inherent in the Constitution).

The Act is simultaneously underinclusive if it is intended to protect minority religions from discrimination. Only those discriminatory actions that result in a substantial burden on religion are redressed by the Act. Any lesser burden will not be redressed, no matter how blatant or distasteful the discriminatory action is. The number of cases in which a discriminatory action is not a substantial burden is significant. *See, e.g., Merritt-Bey v. Delo*, No. 93-2194, 1994 U.S. App. LEXIS 14892; 1994 WL 263780 (8th Cir. June 17, 1994) (finding prison officials' unequal allocation of resources and facilities among religious groups insufficient to constitute a "substantial burden").[5]

The Act's substantial over- and underinclusiveness prove that Respondents' equal protection justification is a pretext. Respondents' attempt to drape RFRA with an equal protection justification

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religions Respondents claim to be the intended beneficiary of the Act. *See, e.g.*, Resp't United States Br. at 25-27. *See generally* Stephen M. Feldman, *Principle, History, and Power: The Limits of the First Amendment Religion Clauses*, 81 Iowa L. Rev. 833, 835 (1996) (book review) (indicating that Christian religions exercise tremendous political power).

[5] The concerns expressed by *amici* regarding the fate of minority religions in the legislative process, as well as by this Court in *Smith*, 494 U.S. at 890, may be overstated. *See* ABA Br. at 6; Coalition Br. at 13-16; Hatch *et al.* Br. at 28; Kennedy *et al.* Br. at 28; Latter-Day Saints Br. at 10-12; NAACP Br. at 8-12. Political science makes clear that small, cohesive groups with an identifiable message do quite well in the legislative process. They fare better than amorphous, large majorities. *See* Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* 127-28, 144 (1971). A good example of the ability of a minority religion to obtain legislative relief from a generally applicable law is Oregon's law exempting peyote use for religious purposes from its generally applicable anti-drug laws, which was passed following *Smith*. Or. Rev. Stat. Ann. § 475.992(5)(a) (Supp. 1996).

is a thinly disguised attempt to shoehorn RFRA into existing equal protection statutes and precedents. *See M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 359 (1819) ("[T]he judicial department- . . . will decide, whether the connection is real, or assumed as the pretext for the usurpation of powers not belonging to the government.").

The true nature of RFRA cannot be gainsaid: it is a congressional attempt to define the substantive scope of the First Amendment's Free Exercise Clause. It nullifies *Smith*'s holding by reinstating the Court's earlier decisions "set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), which are to govern in all cases where free exercise of religion is substantially burdened. . . . " 42 U.S.C. § 2000bb(b)(1). There is no subtlety here. Congress rejected this Court's prevailing precedent and placed its institutional might behind two earlier precedents. This alters the constitutional calculus, violates the separation of powers, and exceeds Congress's authority under Section Five of the Fourteenth Amendment. Far from being a legitimate exercise of Section Five authority to enforce the Equal Protection Clause, RFRA is a redefinition of the Free Exercise Clause that undermines this Court's authority and threatens the States' sovereignty.

B. RFRA Is Not Analogous to Laws that Shift the Burden of Proving Discrimination from an Intent Test to an Effects Test

The Church pins all of its hopes on its inaccurate description of RFRA as a statute that "dispense[s] with proof of deliberate or overt discrimination[.]" Resp't Flores Br. at 29; *Id.* ("That is the only question presented here . . . . "). The simple truth is that the Act does not implicate such burdens of proof. Far from lowering the burden of proof for those charging discriminatory treatment from a discriminatory intent standard to a discriminatory effects standard, which this Court has permitted Congress to do in the equal protection context for the purpose of enforcing constitutional guarantees, *compare Washington v. Davis*, 426 U.S. 229, 238-48 (1976), *with Connecticut v. Teal*, 457 U.S. 440, 447 n.8 (1982),

RFRA makes discrimination, either in purpose or effect, utterly irrelevant to the Free Exercise inquiry.

Congress has been prescribed broad authority to compel obedience to constitutional guarantees. This formulation explains the statutes listed by the Church. *See* Resp't Flores Br. at 10-18; *see also* Resp't United States Br. at 37-39. When this Court has addressed the constitutionality of these statutes, it has upheld them as appropriate means to enforce constitutional guarantees. *See Fullilove v. Klutznick*, 448 U.S. 448, 476 (1980); *Maher v. Gagne*, 448 U.S. 122, 132 (1980); *City of Rome v. United States*, 446 U.S. 156, 158 (1980); *Hutto v. Finney*, 437 U.S. 678, 695 (1978); *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972); *Oregon v. Mitchell*, 400 U.S. 112, 261-62 (1970); *Morgan*, 384 U.S. at 651-52; *James Everhard's Breweries v. Day*, 265 U.S. 545, 558-60 (1924); *National Prohibition Cases*, 253 U.S. 350, 387-88 (1920); *see also* S. Rep. No. 97-417 (1982), *reprinted in* 1982 U.S.C.C.A.N. 186-87 (stating that 1982 amendments to Voting Rights Act of 1965 "remain necessary and appropriate legislation to ensure the full enforcement of the rights guaranteed by the Fourteenth and Fifteenth Amendments to the Constitution"). Even the Pregnancy Discrimination Act (PDA), which the Church argues is an example of a substantive increase in constitutional rights, Resp't Flores Br. at 15, is more accurately understood under the first holding of *Morgan*, 384 U.S. at 651-53, Pet'r Br. at 33-34, as an example of Congress employing its factfinding capacities to conclude that it is necessary to outlaw a particular category of discrimination (here, pregnancy discrimination) that is not unconstitutional on its face in order to prevent what is a constitutional violation (here, sex discrimination). *See Bray v. Alexandria Clinic*, 506 U.S. 263, 331 (1993) (Stevens, J., dissenting).

In contrast, Congress does not have the authority – necessary to uphold RFRA – to adjust constitutional guarantees themselves. In a nutshell, Congress has the capacity to choose the means necessary and appropriate for enforcing the Fourteenth Amendment, but not the authority to choose constitutional ends. It is this calculus which makes sense of the phrase quoted by the Federal Government, " 'The Judiciary must be the final arbiter, but it is not the sole provider of freedom under the Bill of Rights.' " Br. at 39 (quoting *Muir v. Alabama Educ. Television Comm'n*, 688 F.2d

1033, 1046 n.31 (5th Cir. 1982) (en banc), *cert. denied*, 460 U.S. 1023 (1983)).

Neither Respondents nor any of the *amici* in support of Respondents mention the crucial point that the decision in the employment context to move from a discriminatory intent test to a discriminatory effects test was the result of in-depth studies by experts who analyzed employment discrimination from the perspective of "systems." What Congress took from these experts is that the "mechanics" of employment practices perpetuate previously intentional discrimination. Thus, discriminatory effects were indicators of past, if not present, intentional structural discrimination. *See* H.R. Rep. No. 92-238 (1971), *reprinted in* 1971 U.S.C.C.A.N. at 2137. This history is a far cry from Congress's knee-jerk response to *Smith*, and reveals the way in which the effects test in the discrimination context in fact enforces *constitutional* guarantees.

The purpose and effect of RFRA is to increase the level of protection for religious claimants *whether they were the victims of discrimination or not*. *See* Pet'r Br. at 19, n.3.[6] RFRA simply is not limited to a plausible class subject to or even *likely* to be subject to discrimination. *See, e.g.*, *Rome*, 446 U.S. at 172-73; *Morgan*, 384 U.S. at 652-56. It is not the purpose of RFRA to fine-tune the rule against discrimination announced in *Lukumi*, but rather to overturn the holding of *Smith* by

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[6] In an attempt to turn this Court's attention from the fact that Congress found itself competent to define the meaning of the Free Exercise Clause in RFRA, Respondents and *amici* argue that Congress's motive is irrelevant to the constitutional inquiry. Resp't Flores Br. at 32-33; Hatch *et al.* Br. at 22; Prison Fellowship Br. at 24, n.46. The City has no quarrel with that settled constitutional principle. But congressional *purpose* certainly is relevant to determining the meaning of a statute. *See* Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. Cal. L. Rev. 845, 864 (1992) ("Conceptually, however, one can ascribe an 'intent' to Congress in enacting the words of a statute if one means 'intent' in its, here relevant, sense of 'purpose' rather than its sense of 'motive.' "). The purpose and effect of RFRA are to redefine the scope of the First Amendment.

bringing neutral, generally applicable laws under the strict level of scrutiny that the Court has declared is appropriate only in cases of discrimination. *Lukumi*, 508 U.S. at 531-33.

C. Invalidating RFRA Does Not Threaten the Validity of Other Statutes Enacted Pursuant to Section Five of the Fourteenth Amendment

Contrary to Respondents' anxious tone, the sky will not fall if this Court wisely invalidates Congress's foray into the judiciary's singular preserve and the States' sphere of authority. Neither Respondents nor *amici* in support of Respondents cite a single instance where Congress has so dramatically altered the substantive scope of an entire clause of the Constitution, let alone where the Court has upheld the exercise of such power. As the City noted in its merits brief, no true analogues to RFRA exist. Pet'r Br. at 29. RFRA's invalidation would not threaten Title VII or any other statute, but rather would halt this affront to the Constitution's structural integrity, which secures the balance of power between the federal branches, between church and state, and between the federal government and the states.[7]

Section Five of the Fourteenth Amendment gives Congress the power to "enforce" the constitutional guarantees found in the Amendment. The plain meaning of the term

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[7] Title VII's extension to state employers in 1972, *see* 42 U.S.C. § 2000e(a), does not provide support for RFRA. Unlike RFRA, where Congress enacted a law to *redefine* constitutional evils, Title VII was passed for the purpose of redressing the constitutionally recognized evil of discrimination. Title VII's legislative history says as much: "The Constitution is as imperative in its prohibition of discrimination in state and local government employment as it is in barring discrimination in Federal jobs. The courts have consistently held that discrimination by state and local governments, including job discrimination, violates the Fourteenth Amendment and is prohibited." H.R. Rep. No. 92-238 at 2153 (1971), *reprinted in* 1971 U.S.C.C.A.N. at 2153; *see also Moore v. City of San Jose*, 615 F.2d 1265, 1273 (9th Cir. 1980) ("Title VII was meant . . . to create an additional remedy to redress discrimination that was already unlawful.").

"enforce" is "to force compliance with" or "to compel obedience to." That meaning is consistent with late nineteenth century legal dictionaries. *See* William C. Anderson, *A Dictionary of Law* 466 (1891) (under "force") ("To constrain, or compel; to give effect to: as, to enforce an order of court; Congress may enforce constitutional prohibitions by appropriate legislation . . . . "); Arthur English, *A Dictionary of Words and Phrases Used in Ancient and Modern Law* 322 (1899) (defining "enforce" as "to cause to have force and effect. To compel obedience to"); *see also* Henry C. Black, *A Law Dictionary* 425 (2d ed. 1910) ("To put into execution; to cause to take effect; to make effective . . . . "). It is ridiculous to claim that RFRA compels obedience to the constitutional rights under the Free Exercise Clause announced in *Smith*. Pet'r Br. at 22-23.

Certainly, the Court has approved surgical application of prophylactic standards to voting practices based on a record of abuses, *see Katzenbach v. Morgan*, 384 U.S. 641 (1966); *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966); *see also Rome*, 446 U.S. at 182; *Gaston County, N.C. v. United States*, 395 U.S. 285, 291 (1969), and it has not declared the application of prophylactic standards to States as employers unconstitutional. *See Fitzpatrick v. Bitzer*, 427 U.S. 445, 457, n. 11 (1976). The City does not question Congress's authority to prevent constitutional violations through appropriate means.

This Court's expansive reading of congressional power vis-a-vis the Equal Protection Clause should be the zenith of congressional authority, however, not the springboard for ever-expansive federal power. Thus, the Voting Rights Act and Title VII can stand as exercises of prophylactic power, but RFRA must fall as a statute that enforces no constitutional guarantees but rather attempts to recast such guarantees. Drawing the line at those examples of the exercise of prophylactic power in specific arenas leaves RFRA considerably beyond Congress's reach. In fact, the Court can issue a decision in this case as narrow as RFRA is broad.

Congressional power, or lack thereof, exists on a spectrum of possibilities. The difference between existing prophylactic

equal protection rules and RFRA is not merely a matter of degree. It is a difference in kind. RFRA crosses the line from being remedial to being a constitutional amendment. No law passed as a prophylactic measure to ensure equal protection guarantees is threatened if this Court invalidates Congress's attempt in RFRA to redefine the scope of the Free Exercise Clause.

Invalidating RFRA will not require the invalidation of any other law or threaten any Supreme Court precedent. Indeed, it is the maintenance of RFRA that will cause havoc. If RFRA is upheld, the door will be opened to a previously unwitnessed increase in federal power against the States. If this Court were to adopt the Church's suggestion that Section Five authority should be judged according to whether the law has a "reasonable nexus" to a constitutional right, Resp't Flores Br. at 25, Congress's power under Section Five would be boundless. Under the suggested "reasonable nexus" standard, the federal government could impose the Federal Rules of Criminal Procedure, the Federal Rules of Civil Procedure, and the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* (1994), on the States as laws that have a reasonable nexus to procedural due process guarantees. Congress, in effect, would have been handed a plenary police power over the States that would wipe out the federalism principles inherent in Section Five. The Constitution's inherent federalism principles require a close textual reading of Section Five, which is to say that Section Five only permits Congress to "enforce, by appropriate legislation, the provisions of" the Fourteenth Amendment. U.S. Const. amend. XIV, § 5.

D. Section Five of the Fourteenth Amendment Does Not Give Congress Authority to Define the Substantive Reach of the Constitution

The most curious argument raised by *amici* supporting Respondent regarding Congress's Section Five powers appears in the brief filed by Senator Orrin Hatch, *et al.*, which once again brings Alice in Wonderland to mind when she said, "that's just the same . . . only the things go the other way."

Carroll, *supra*, at 192-93. In that brief, the Senators rightly point out that Congress does not have the constitutional authority to ratchet up, or to substantively increase constitutional liberties. Hatch *et al.* Br. at 15-16; *see also* Pet'r Br. at 23. The Senators endorse the City's view that the substantive power theory, which is an alternative holding of *Morgan*, 384 U.S. at 648-53,[8] and which is wholeheartedly embraced by the Church, Resp't Flores Br. at 49, violates the Constitution. Hatch *et al.* Br. at 20-24. But they then defend RFRA's expansion of the Free Exercise Clause on the grounds that it is a "statute" rather than a constitutional amendment. Hatch Br. *et al.* at 24-30. Apparently, their theory is that so long as Congress *calls* an attempted constitutional amendment a "statute," Congress is within the scope of its Section Five authority. Surely, this Court has the constitutional authority, indeed the obligation, to elevate substance over form. Whatever Congress calls RFRA, it is a dramatic increase in the scope of the Free Exercise Clause of the First Amendment, and, per Senator Hatch's theory, should be invalidated as beyond Congress's authority.

The fact that some of the states claim to be willing to accept the imposition of RFRA's higher standard under the Free Exercise Clause, *see* Maryland Br. at 6-18; Texas Br. at 20-25; Virginia House Br. at 5-11, does not make it constitutional for Congress to impose that standard on them. *See New York v. United States*, 505 U.S. at 181-82 (holding that where Congress exceeds its authority relative to the States, the departure from the constitutional plan cannot be ratified by the "consent" of state officials).

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[8] The United States's brief inaccurately characterizes the City's position regarding *Morgan*. *See* Resp't United States Br. at 9-17. The City has not asked to overturn the case in its entirety, but rather, only the substantive power theory implicit therein.

III. RFRA CAUSES GOVERNMENTS TO INVESTIGATE THE THEOLOGY OF EVERY RELIGION RESIDENT WITHIN THEIR BOUNDARIES AND THEREFORE IMPERMISSIBLY ENTANGLES GOVERNMENT AND RELIGION

Contrary to the mischaracterization of the City's position by the Coalition for the Free Exercise of Religion, the City does not believe that individual exemptions from generally applicable laws raise necessary Establishment Clause concerns. *Compare* Coalition Br. at 8, *with* Pet'r Br. at 48. The error in RFRA is its wholesale elevation of the authority and power of all religions, an error not reflected in individualized exemptions.

RFRA's blanket least restrictive means test places governments in a much less comfortable position than the Coalition would lead this Court to believe. *See* Coalition Br. at 3-11. The Coalition suggests that government may wait until a legal claim is raised in order to craft an exemption, implying that governments may make laws in ignorance of resident religions and then correct those laws through RFRA litigation. Coalition Br. at 11-12. The truth is that the federal attorney fee provisions, 42 U.S.C. § 1988 (1994), require responsible governments to worry about likely exemptions from all quarters long before a legal claim is filed against a generally applicable statute.

RFRA provides a legal cause of action to be vindicated in the courts. *See* 42 U.S.C. § 2000bb-1(c). Any change a government makes in a law in response to a RFRA claim can create "prevailing party" status under 42 U.S.C. § 1988(b), opening the government to an award of attorney's fees for the claimant. *See, e.g., Farrar v. Hobby*, 506 U.S. 103, 112-14 (1992); *Hanrahan v. Hampton*, 446 U.S. 754, 756-58 (1980). To guard against attorney fee liability, a government has two choices: (1) become expert on those religions within its jurisdiction, so as to craft laws without substantially burdening any religious practice; or (2) in lieu of becoming expert on every religion within its boundaries, to consult with a council of religious advisors every time a law is passed. Either avenue leads to impermissible entanglement. *See Larson v. Valente*, 456 U.S.

228, 252-55 (1982); *Levitt v. Committee for Public Ed. and Religious Liberty*, 413 U.S. 472, 481-82 (1973); *Lemon v. Kurtzman*, 403 U.S. 602 (1971).[9]

IV. THE HISTORY OF RELIGIOUS EXEMPTIONS IS IRRELEVANT TO THIS CASE

Whether or not there is historical support for the legality of court-ordered exemptions from generally applicable laws, *compare* Michael McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1420 (1990), *with* Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 Geo. Wash. L. Rev. 915, 947-48 (1992), it is farfetched to believe that the Framers would have viewed RFRA as a legitimate exercise of *congressional* authority. The Federalists opposed a bill of rights, declaring that it was unnecessary because the Constitution gave Congress no authority to enact any laws over issues of conscience, religion, or speech. *The Federalist* No. 84 at 513 (Alexander Hamilton) ("For why declare that things shall not be done which there is no power to do?"); Leonard W. Levy, *Legacy of Suppression & Freedom of Speech and Press in Early American History* 225-26 (1960).

The Federalists asserted that an enumerated set of powers would limit the exercise of congressional power and assumed that Congress would not act within any sphere not specifically denominated. *The Federalist* No. 84 at 515 (Hamilton) ("The truth is, . . . that the Constitution is itself . . . a bill of rights."); Levy, *supra*, at 225. Therefore, they reasoned, a bill of rights would only cause mischief by providing a list of the people's liberties that might later be construed to be limited to that list. *The Federalist* No. 84 at 513 (Hamilton) ("[A bill of rights] would contain various exceptions to powers which are not

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[9] The United States and the American Center for Law and Justice express the correct view that a ruling striking RFRA on Establishment Clause entanglement grounds *could* invalidate certain state laws that have instituted strict scrutiny in the free exercise context. Resp't United States Br. at 40-41; American Center Br. at 3-4.

granted; and . . . would afford a colorable pretext to claim more than were granted."); Geoffrey Seed, *James Wilson* 102 (1978) (discussing Wilson's view that anything accidentally omitted from a bill of rights would be presumed to be given to government). Two of the leading architects of the structure of the Constitution, Alexander Hamilton and James Wilson, were ardent on this point. *The Federalist* No. 84 at 513 (Hamilton). James Madison, who ultimately drafted the First Amendment, only agreed to do so in the face of enormous political pressure that threatened to undermine ratification of the main body of the Constitution. *See* Adrienne Koch, *Madison's "Advice to My Country"* 29 (1966) (stating that "the extent and vociferousness of the demands for a bill of rights throughout the country" impressed Madison); *see also* James Madison, 2 *The Debates in the Federal Convention of 1787 Which Framed the Constitution of the United States of America* 556 (Gaillard Hunt and James Brown Scott eds., 1987) (remarks of Colonel Mason) (asserting that a "Bill of Rights . . . would give great quiet to the people"). The Religious Freedom Restoration Act would have been unthinkable to the Framers.

As to the twists and turns of the Fourteenth Amendment's history, *see Brown v. Board of Education of Topeka*, 347 U.S. 483, 489 (1954), what is most notable is what is lacking. It is always difficult to prove the absence of a historical fact, especially in the context of a complicated historical record, but the truth is that there is simply no support in history for the proposition that the Fourteenth Amendment was intended to permit Congress the power: (1) to overrule Supreme Court decisions interpreting the Constitution; (2) to pick and choose between Supreme Court precedents; (3) to create constitutional rights by amending the Constitution in the absence of ratification; or (4) to impose mere policy judgments on the States in violation of their sovereign authority. Whatever the history says on other scores, the Fourteenth Amendment did not make Congress an appellate court, did not amend the Constitution's ratification procedures, and did not make the States servants of Congress's policy whims.

CONCLUSION

This Court should declare the Religious Freedom Restoration Act unconstitutional, reverse the judgment below, and remand the case to the district court for further proceedings consistent with this Court's decision.

Respectfully submitted,

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